

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





ORIGINAL

76-7153

To be argued by:  
JAMES DAVID JACOBS

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P/S

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**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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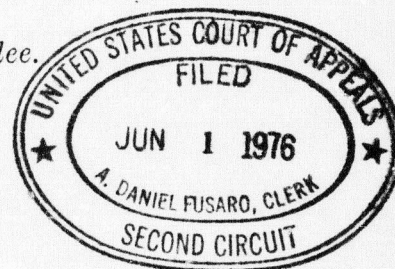
REBOUND SYSTEMS, INC.,  
*Plaintiff-Appellant,*

*against*

MATCHPOINT INDUSTRIES, INC.,  
*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Southern District of New York



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**PLAINTIFF-APPELLANT'S BRIEF**

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STATUTES INVOLVED

CPLR 302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce ....



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
REBOUND SYSTEMS, INC., :

Plaintiff- :  
Appellant, :

Docket No. 76-7153

-against- :

MATCHPOINT INDUSTRIES, INC., :

Defendant- :  
Appellee. :

-----x  
PLAINTIFF-APPELLANT'S BRIEF

STATEMENT OF ISSUES

Defendant is a Texas corporation whose sole business is exploitation of a single patent. Over a period of seven months, by personal visits, telephone calls and letters to plaintiff and plaintiff's potential distributor, all of which were made into the State, defendant threatened patent and trademark infringement suits, unsuccessfully negotiated a patent license and unsuccessfully negotiated a distributorship agreement.

Plaintiff appeals the dismissal of its complaint seeking a declaratory judgment that defendant's patent is invalid, unenforceable and not infringed, and a judgment that defendant engaged in unfair competition. The issues presented are:

(1) Did defendant "transact business" within the State pursuant to CPLR 302(a)(1)?

(2) Does CPLR 302(a)(2) and (3) require plaintiff on a motion to dismiss for lack of jurisdiction to make a prima facie showing of defendant's tortious intent and knowledge?

#### STATEMENT OF CASE

##### PRELIMINARY STATEMENT

Plaintiff-appellant Rebound Systems, Inc. ("Rebound") submits this brief in support of its appeal from the district court's, Griesa, D. J., grant of a motion to dismiss the complaint for lack of personal jurisdiction over defendant-appellee Matchpoint Industries, Inc. ("Matchpoint"). On April 15, 1975 plaintiff filed a complaint seeking a declaratory judgment that Matchpoint's patent was invalid, unenforceable and not infringed, and a judgment that Matchpoint engaged



in unfair competition. (14a)<sup>1</sup>

Matchpoint moved to dismiss the complaint on the grounds of lack of personal jurisdiction and improper venue. (15a-17a) In an opinion and order filed February 26, 1976, after discussing CPLR 301, 302(a)(1), and 302(a)(2), the district court held that it lacked jurisdiction over Matchpoint. We submit the district court erred with respect to CPLR 302(a)(1) and 302(a)(2) and (3). We do not contest its holding under CPLR 301.

The district court attempted in its opinion to concisely summarize the facts (122a-124a). Unfortunately, such a summary necessarily excludes the surrounding circumstances which reveal the intent with which the acts were performed. To determine personal jurisdiction under CPLR 302 decisional law indicates that the intent of the acts is as important as their numerosity.

Therefore, we recite in some detail the entire set of transactions that gave rise to the present action. We emphasize the unique purpose of Matchpoint's business--the exploitation of a single patent--and the deliberateness of Matchpoint's actions and the success that they bore, which were erroneously

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<sup>1</sup>References in parenthesis refer to pages of the Appendix.

ignored by the district court.

In the argument we show that in view of the uncontradicted facts the district court erred on the law. With respect to CPLR 302(a)(1) the district court erroneously rejected applicable precedent, and also failed to consider the purposefulness and success of Matchpoint's numerous contacts with New York. With respect to CPLR 302(a)(2) and (3) we demonstrate that the district court's requirement that Rebound demonstrate Matchpoint's tortious intent is totally inconsistent with New York law.

#### BACKGROUND FACTS

Rebound is a New York corporation engaged in the manufacture and marketing of a piston pump device that repressurizes opened tennis ball cans. (57a)

Matchpoint is a Texas corporation which owns full right and title to United States Patent No. 3,853,222 ("patent"), which purports to claim inventions in a pressurizable pump attachment for tennis ball cans. (18a, 20a) Matchpoint has no other business than exploiting its rights in the alleged patent. Indeed, Matchpoint apparently has no assets other than the patent, its ledgers, and the mold for its device, (81a-82a) and, until recently, it maintained its place of business at the home of



one of its officers. (81a)

Matchpoint was conceived and formed for the purpose of exploiting the patent. (84a) The patent and the exploitation of the patent was its first business, its principal business, and remains its only business. (84a)

Matchpoint does not manufacture the patented apparatus. Rather, it is manufactured by a related corporation, Plastronics, Inc. (79a)

Nor does Matchpoint market the patented apparatus. (20a-21a) Rather, pursuant to an agreement, Unique Sports Products, Inc. ("Unique") has an exclusive right to distribute the patented products. (91a) Matchpoint has no control over Unique. (86a; 21a) Matchpoint does not concern itself with marketing policy, except from time to time to make suggestions to insure adequate marketing throughout the country, including New York. (96a-97a; 110a-112a) Matchpoint does not even own the trademark under which its patented apparatus is sold--it is owned by Unique. (58a)

Thus, with regard to the sale of the patented apparatus Matchpoint's activities are no more than paper transactions. Unique issues a purchase order to Matchpoint. The products are

manufactured by Plastronics and shipped directly to Unique. Matchpoint invoices Unique for the products shipped by Plastronics. (89a)

Matchpoint's paper activities were aptly summarized by Matchpoint's vice president and chairman of the board:

"Purchasing the material from Plastronics, paying the bills to Plastronics, selling material to Unique Sports and billing and collecting the moneys from Unique Sports." (82a)

In sum, Matchpoint is a very special company; its raison d'etre was to exploit the patent. Rebound and its product threatened Matchpoint's success. Thus, Matchpoint was forced to engage in meaningful non-paper transactions.

#### MATCHPOINT ACTIVITIES AGAINST REBOUND

In early 1974 Rebound commenced marketing its new product. Rebound approached Tensor Corporation ("Tensor"), a New York corporation with offices in Brooklyn, an established manufacturer and distributor of tennis equipment, to distribute its products. By April 1974 negotiations had proceeded to the point where both companies had decided in principal that Tensor was to be Rebound's distributor to the sporting goods trade. (49a-50a; 57a-58a)



During late summer and fall 1974, Tensor designed and printed labels for the product. In addition, it spent substantial sums for printing catalogues, displaying the products and issued releases to trade magazines and sales representatives advising of the addition of Rebound's product to its line. The point was reached where Tensor took initial orders. (50a)

At this point, Matchpoint appeared on the scene. In late October 1974 both Tensor and Rebound received certified letters, return receipt requested, from Matchpoint's attorney. (26a-27a) Those letters were sent to Rebound's and Tensor's offices in New York. Matchpoint's attorney advised both Rebound and Tensor of a pending patent application covering pressurized tennis ball containers. Matchpoint threatened that "it appears that your [products] may incorporate the functional design of [our] device." The letter also opined that the trademark under which both Rebound and Tensor were to sell the products infringed the trademark under which Matchpoint's device was sold.<sup>2</sup>

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<sup>2</sup> Actually, the letter incorrectly referred to the trademark as Matchpoint's. In truth, it was the trademark of Matchpoint's distributor. (58a)

This letter immediately chilled the budding relationship between Rebound and Tensor. Initially, Tensor feared both a patent and trademark infringement suit. However, after consulting with its attorneys, Tensor recognized that, until the patent issued, only the trademark allegation presented an immediate problem. (51a)

In order to avoid any problem Rebound agreed to change its mark and adopted a mark that was above suspicion. Rebound also referred the patent infringement charges to its attorneys. (51a; 59a)

Rebound's patent attorney advised Rebound on December 4, 1974 and Matchpoint, by letter sent from New York to Texas, on December 13, 1974, that in his opinion the only claim in Matchpoint's pending patent that Rebound's device arguably infringed was invalid over prior art. (59a; 28a-29a)

Matchpoint's reply followed shortly thereafter. In a letter dated December 30, 1974, again sent from Texas into New York, Matchpoint's attorney advised Rebound's attorney of the issuance of the patent. (30a) He further informed Matchpoint's attorney that, in his opinion, the prior art cited by Rebound did not invalidate the patent. And he repeated his charge of trademark infringement.



On January 6, 1975 Rebound's attorney from New York informed Matchpoint's attorney in Texas of Rebound's position regarding the various matters in dispute. (31a-33a) In a detailed explanation Rebound's attorney explained Rebound's contention that Matchpoint's patent was invalid. The prior art was dissected and the patent's claims shown to be invalid. (33a) He concluded that in view of the self-evident invalidity of the patent, Rebound did not intend to change its design to avoid the contention that it infringed the broadest claim of the patent. (32a) He added, in order to avoid the hint of a conflict, Rebound would adopt a new trademark. (32a)

Shortly after learning that a patent had been issued to Matchpoint, Tensor advised Rebound on January 7, 1975 that it would not become a distributor of the Rebound products unless the patent controversy between Matchpoint and Rebound was resolved or unless Rebound could furnish a full indemnification. (52a) At that time such indemnification was too onerous for Rebound, an infant corporation, to bear. (60a-61a)

Subsequently, Matchpoint again warned Tensor regarding the patent and attempted to induce Tensor to abandon Rebound by offering a distributorship of Matchpoint's product. At a trade show in Texas, Matchpoint's Chairman David Kennington reiterated to a Tensor employee that Matchpoint intended to en-

force its patent against Rebound. Kennington also inquired whether Tensor would be interested in distributing Matchpoint's product. (52a-53a; 98a-99a)

Despite the advice of its attorneys that Matchpoint's patent was invalid, the severe impact of Matchpoint's threats forced Rebound to seek a settlement. Therefore, shortly after Tensor's announcement that it would not be Rebound's distributor, Rebound's vice president Bernard J. Jacobson in New York, called John Helms, Matchpoint's president in Texas. Mr. Jacobson offered to travel from New York to Texas to meet with Helms to discuss a patent license agreement. Helms stated that it was necessary for Jacobson to speak to Kennington. (67a-68a)

Within a few days Jacobson, in New York, and Kennington, in Texas, discussed the matter over the telephone. Kennington invited Jacobson to Texas; Jacobson accepted and purchased an airline ticket for the trip. (68a)

Approximately at the same time Tensor's President, Jay Monroe, called Matchpoint's attorney Jack Kanz from New York. Monroe told Kanz that Tensor had not consummated the distributorship agreement with Rebound, and therefore, Tensor should not be included in any patent infringement suits. In reply, Kanz



5 suggested that Rebound should consider distributing Matchpoint's competing product. Monroe requested Kanz to have Matchpoint contact him. (53a)

Approximately on January 27, 1975 Kennington called Monroe at Tensor in Brooklyn. Kennington informed Monroe that he would be in New York in the near future and volunteered to meet with Monroe at that time. This suggested conference was entirely at Kennington's volition. (54a, 105a-106a)

On the same day Kennington called Rebound's Vice President Jacobson. Kennington also informed Jacobson that he would be visiting in New York in a few days, and rather than Jacobson traveling to Texas, Kennington would meet Jacobson in New York. Again, this meeting in New York was entirely at Matchpoint's volition. (68a)

On January 30, 1975 Kennington met with Jacobson in New York City at the Harvard Club. According to Jacobson, Kennington stressed that Matchpoint intended to enforce its patent. Jacobson and Kennington discussed patent license terms. Kennington stated that Matchpoint was interested in getting dollars from Rebound, rather than percentages, and that Matchpoint could manufacture the Rebound products for Rebound. (68a-69a) Kennington admitted negotiating the

license, did not deny discussing "patent enforcement", but only denied threatening "litigation". (25a)

After meeting with Jacobson, in Manhattan, Kennington made the short trip to Brooklyn for his appointment with Jay Monroe at Tensor's offices. (69a) Kennington warned Tensor that Matchpoint's patent was a "strong one", and that Matchpoint intended to litigate. He suggested that Tensor should not be an opponent in that litigation. Kennington informed Monroe that Matchpoint had offered to manufacture and assemble Rebound's products for Rebound, and that if Rebound did not accept this proposal, Matchpoint would sue Rebound for infringement. Kennington added that Rebound's acceptance of Matchpoint's offer to manufacture the Rebound product was not likely--the cost to Rebound for such assembly would be prohibitive. (54a-55a).

Kennington also suggested to Monroe that Tensor become a marketing representative for the Matchpoint product. Apparently to determine the advisability of Matchpoint appointing Tensor a marketing representative, Kennington inquired in detail regarding Tensor's relationship with particular retail chains. Monroe gave Kennington the names of several buyers at such chains in order that Kennington could make an independent determination of Tensor's ability to market Matchpoint's products. (55a-56a; 105a-109a)



Over a period of the three months following the January 30, 1975 meetings, Jacobson and Kennington had numerous telephone conversations between New York and Dallas. Numerous arrangements were discussed in an attempt to arrive at mutually satisfactory terms for a patent license agreement. However, these attempts were unsuccessful. (69a-70a; 25a)

As a final stab at settlement Jacobson suggested, by telephone from New York, since only the royalty was in dispute, that Kennington send a proposed license agreement to New York. (69a-70a) On May 12, 1975 Kennington sent to New York a proposed license agreement. (34a-38a)

In a telephone call to New York on May 14, 1975 Kennington inexplicably advised Jacobson that he was unaware that Rebound was seeking a patent license from Matchpoint. He added that he did not believe Matchpoint would grant a patent license, regardless of the royalty. (70a)

On May 15, 1975 Jacobson confirmed that conversation in a letter to Kennington sent from New York. (70a; 73a) Jacobson expressed his surprise at Kennington's

statements, which were inconsistent with over 5 months of negotiations, conducted by letter, by telephone, and by a meeting in New York. After a hiatus of approximately 2 weeks Kennington responded by letter. (39a) He confirmed Matchpoint's refusal to license its patent. (71a, 39a)

Nor was Matchpoint alone in its efforts to damage Rebound's competitive ability; it received substantial aid from its exclusive distributor Unique. Unique falsely advised the trade that patent suits were pending against Rebound. (62a-64a) As a result Rebound was forced to indemnify customers. (62a) Moreover, these threats undoubtedly hurt Rebound's sales. (62a)

Thus, by May 1975 Matchpoint had played its hand. It had already persuaded Tensor not to assume distributorship of Rebound's product. (56a) It had strung Rebound along holding out a patent license for 5 months, only to pull out the rug. (39a) It (and its exclusive distributor Unique) had threatened almost anyone who would listen with dire patent consequences if he handled Rebound's device. (62a-64a) In short, Matchpoint's activities retarded Rebound's penetration of the market, increased its marketing costs, and otherwise resulted in a substantial loss of profit. (61a-62a)



### PRIOR PROCEEDINGS

With its first choice of distributor scared off, and its attempts for an amicable settlement frustrated, Rebound commenced this suit on May 15, 1975. Matchpoint was served in Texas.

As a first cause of action Rebound sought a declaratory judgment that Matchpoint's patent was invalid, not infringed and unenforceable. (3a-10a) As a second cause of action Rebound alleged that Matchpoint engaged in unfair competition by, among other things, threatening Rebound, its potential distributor and its customers with vexatious litigation, knowing full well that the patent was invalid and not infringed. (6a; 13a) It also alleged that Matchpoint maliciously attempted to destroy Rebound's relationship with Tensor through insincere offers that Tensor become Matchpoint's distributor. (12a-13a)

In late October 1975 Matchpoint moved pursuant to Federal Rules of Civil Procedure 12(b)(2) and (3) to dismiss Rebound's complaint on the ground that the court lacked personal jurisdiction over Matchpoint and that venue was improperly laid in the Southern District of New York.<sup>3</sup> (15a-

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<sup>3</sup> As alternative relief Matchpoint sought transfer of the action pursuant to 28 U.S.C. §1406 on the ground that venue was improperly laid in the Southern District of New York and transfer pursuant to 28 U.S.C. §1404(a) to transfer the action to the Northern District of Texas on the ground of convenience of witnesses and parties and in the interest of justice.

17a) The motion was fully briefed and, on February 10, 1976, on the single issue of whether Unique was Matchpoint's agent in New York (75a), the testimony of Matchpoint's Kennington was taken.

On February 25, 1976 Judge Griesa handed down his opinion and order dismissing the action for lack of personal jurisdiction over Matchpoint--he declined to rule on the other aspects of the motion. (119a-127a) Judge Griesa concluded:

(a) Matchpoint was not "doing business" in New York within CPLR 301; (122a)<sup>4</sup>

(b) Unique was not Matchpoint's agent (122a);<sup>4</sup>

(c) Matchpoint had not transacted business within CPLR 302(a)(1); (122a) and

(d) Matchpoint had not committed a tort in New York within CPLR 302(a)(2). (126a-127a)

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<sup>4</sup>We do not contest these holdings on this appeal.



### ARGUMENT

The district court held that the contacts that Matchpoint had with New York were insufficient to constitute transacting business within the meaning of CPLR 302(a)(1) and that Rebound failed to make "a prima facie showing of the tortious act relied upon" to sustain jurisdiction under CPLR 302(a)(2).

In reaching the first conclusion, the district court ignored the purposefulness of each of Matchpoint's many contacts with New York and the intended and successful consequences of these contacts. In Point I we demonstrate that under similar circumstances where a foreign corporation threatens a domestic corporation with patent infringement, courts have not hesitated to apply the domestic state's long-arm statute on the basis that the patentee was "transacting business". Indeed, such jurisdiction has been exercised in circumstances where the patentee had much less contact than here.

We also show below that under the general principles of long-arm jurisdiction, even absent this guidance from sister jurisdictions, Matchpoint has "transacted business" in New York State. As developed by the New York State courts, this test is not a hard and fast formula, but an examination of the particular activities of the foreign defendant in the context

of its overall business and the claim alleged. When viewed from this perspective, the deliberate New York activities of Matchpoint, a corporation with only one substantial asset-- a patent--and a single business purpose--exploitation of the patent--are sufficient to sustain jurisdiction.

In Point II we show that the district court erred in requiring Rebound to make a "prima facie" showing of a tort. According to the established law of New York, under CPLR 302(a)(2) or (3), all that Rebound had to show was that Matchpoint was the author of the acts that it alleged in the complaint. This Rebound admittedly did.

#### POINT I

##### MATCHPOINT HAS TRANSACTED BUSINESS IN NEW YORK STATE

The district court in dismissing the complaint held that Matchpoint had not "transacted business" in New York State pursuant to CPLR 302(a)(1). As the district court implicitly recognized, this holding is inconsistent with the principal authority.

Under a statute similar to CPLR 302(a)(1)<sup>5</sup> the

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<sup>5</sup> Minnesota Statutes Annotated §543.19(1) states in part:  
"As to a cause of action arising from any acts enumerated in this subdivision, a court ... may exercise personal jurisdiction over any foreign corporation ... if, in person or through an agent, the foreign corporation ... (b) transacts any business activities within the state...."



Eighth Circuit, en banc, recently considered facts that were even less conducive to finding personal jurisdiction than those here, but yet unanimously held that jurisdiction existed. B & J Manufacturing Company v. Solar Industries, Inc., 483 F.2d 594 (8th Cir. 1973). On a certified interlocutory appeal from the district court's refusal to dismiss the complaint, defendant argued that the court lacked personal jurisdiction. Plaintiff had filed a declaratory judgment action for patent invalidity and non-infringement in the United States District Court for the District of Minnesota and had served defendant in Illinois.

Plaintiff urged that the cause of action arose out of business that defendant had transacted within Minnesota, and therefore personal jurisdiction was proper under the Minnesota long-arm statute. Defendant's only activity in Minnesota relating to the suit was letters, which it had mailed to plaintiff from out of state, threatening infringement. Defendant or its employees had not personally visited the State for more than a year prior to the suit, and that visit was entirely unrelated to the patent or the patented product. In fact, the court specifically noted that defendant had made deliberate efforts to avoid exposing itself to personal jurisdiction in Minnesota. (483 F.2d at 598)

Sitting en banc, the court unanimously affirmed the refusal to dismiss. It held that the mere fact that defendant's attorney sent letters to plaintiff, which were received in Minnesota, advising plaintiff to refrain from infringing defendant's patent, was a "transaction of business in Minnesota". The court reasoned as follows:

"Regardless of the validity of the defendant's patent, there is no doubt but that the requests and threats were designed to reduce competition and thereby improve defendant's marketing and economic position. As such, we are convinced that the sending of these letters did, in a very real sense, constitute a transaction of business in Minnesota." 483 F.2d at 598 (emphasis added).

The district court recognized the controlling import of B & J Manufacturing. Judge Griesa attempted to distinguish that decision on the ground that there were other "substantial contacts" in addition to sending the letters. (125a) However, these other contacts (e.g., advertising in national magazines, unrelated sales into this state), which we believe cannot be properly characterized as "substantial", had no influence on the Eighth Circuit's conclusion that the defendant transacted business out of which the action arose. Indeed, these unrelated contacts could not have influenced that decision since the Minnesota statute requires, as does the New York statute, that the action arises



out of the business transacted. (483 F.2d at 598)

The district court also sought support for rejection of B & J Manufacturing in Rheem Manufacturing Co. v. Johnson Heater Corp., 370 F.Supp. 806 (D. Minn. 1974). In that case defendant had no contacts with the jurisdiction other than merely sending a letter, which, unlike the letters in our case, contained "neither an allegation of infringement nor a threat of enforcement."<sup>6</sup> (370 F.Supp. at 808) Obviously that case is inapplicable to the present situation where Matchpoint had other substantial contacts in addition to sending many threatening letters. These included numerous telephone calls, and personal visits in New York to both Rebound and Tensor.

Judge Griesa concluded by summarily rejecting B & J Manufacturing as authority.

"In any event, I cannot accept the proposition that, under the New York long-arm statute, the mere giving of notice of a possible legal claim under the patent or trademark laws, whether by letter or in person, constitutes the transacting of business." (126a)

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<sup>6</sup> Judge Griesa specifically found "Kennington indicated to Jacobson and Monroe that Matchpoint intended to enforce its patent rights". (124a)

The district court's reasoning is erroneous. It not only neglects to recognize Matchpoint's many other activities in and with New York (e.g., personal meetings in New York, numerous calls and letters, patent license and distributorship agreement negotiations), it also fails to accord the proper importance to the deliberateness of Matchpoint's individual transactions in New York, and, by treating them as isolated events, ignores the totality of Matchpoint's activities and their intentional effect on New York commerce.

These errors are manifest when reference is made to other decisions under CPLR 302(a)(1)--courts have looked to the purposefulness and importance of the contacts, rather than their numerosity. Possibly the closest case to the instant facts decided under CPLR 302(a)(1) is ECC Corporation v. Slater Electric Inc., 336 F.Supp. 148 (E.D.N.Y. 1971). Judge Dooling denied a motion by the foreign patentee Lucerne to dismiss the complaint for declaratory judgment of patent invalidity for lack of personal jurisdiction.

Lucerne's contacts with New York were extremely tenuous; a single meeting that may have been as short as one-half hour between Lucerne and its co-defendant in which the essential terms of the exclusive license under which it



obtained the patent in suit were negotiated in New York. Additionally, Lucerne's patent counsel personally visited a potential customer of plaintiff in New York and planted "the idea that to buy plaintiff's controls might infringe the patents by [defendants]." (336 F.Supp. at 151)

From these two contacts, one of which was relatively unrelated to the cause of action, Judge Dooling held that Lucerne "transacted business" in New York and that the cause of action arose from that business. Relying on prior decisions Judge Dooling reasoned that the purposefulness and importance of these two contacts justified jurisdiction over Lucerne.

"For Subsection 1 purposes Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 1965, 15 N.Y.2d 443, 456-457, 261 N.Y.S.2d 8, 209 N.E.2d 68, taken with American Eutec. Weld. Alloys Co. v. Dytron Alloys Corp., 2d Cir. 1971, 439 F.2d 428, 431-432, and Liquid Carriers Corp. v. American Marine Corp., 2d Cir. 1967, 375 F.2d 951, 954-956, makes clear that if the corporate intention is through personnel of executive substance to come to the state to effect a purposeful and important activity on the corporation's part, and by doing so such personnel significantly advance the making of a corporate contract of importance, that activity and presence suffice as a basis for a later exercise of personal jurisdiction by the State of New York over the foreign corporation with respect to matters that can genuinely be said to arise out of the resultant contract notwithstanding that

the signing of the contract takes place later at the domicile of the out of state corporation." 336 F.Supp. at 151-52 (emphasis supplied).

This view of controlling New York authority has been reinforced by more recent decisions. These cases, generally involving contracts, emphasize evaluating defendant's purposefulness, intent, and success to determine jurisdiction.<sup>7</sup> This is illustrated in Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc., 32 N.Y.2d 583, 347 N.Y.S.2d 47,300 N.E.2d 421 (1973) where the New York Court of Appeals unanimously reversed the Appellate Division to impose personal jurisdiction upon Schuminsky, a foreign citizen and president of plaintiff Hi Fashion, who had been named as a counterclaim defendant.

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<sup>7</sup> Judge Griesa also relied upon prior CPLR 302(a)(1) cases involving contracts in support of its assertion that jurisdiction was not proper with Matchpoint. Lehigh Valley Industries, Inc. v. Birenbaum, 527 F. 2d 87 (2d Cir. 1975); Chemical Bank v. World Hockey Association, 403 F.Supp. 1374, 1378-79 (S.D.N.Y. 1975); McKee Electric Co. v. Rauland Borg Corp., 20 N.Y.2d 337, 382, 283 N.Y.S.2d 34, 37-38, 229 N.E. 2d 604, 607 (1967). (124a-125a) These cases are clearly distinguishable from our case. The defendants in these cases had almost or no contact with the State regarding the matters out of which the action arose. For example in the McKee decision, the four judge majority concluded that most of defendant's contacts did not relate to the cause of action, and those that did were "infinitesimal." 20 N.Y.2d at 382, 283 N.Y.S. 2d at 38. It is beyond dispute that Matchpoint has many more contacts with New York than the defendants in these three cases.



Schuminsky had only one contact with New York--his personal delivery to defendant Hammond at its offices in New York of the contract which included his guarantee to Hammond of Hi Fashion's credit.

Nevertheless, speaking for an unanimous court, Chief Judge Fuld indicated that there was sufficient grounds to sustain jurisdiction over Schuminsky upon two independent bases. He first held that numerosity was not important.

"[A] 'single transaction in New York' was sufficient to comply with the demands of the statute.

\* \* \* \*

"So essential was his delivery of the guarantee to its validity and existence as a contract that Schuminsky must be deemed to have 'purposefully availed himself' of the privilege of conducting activities within [this] State; thereby 'invoking the benefits and protections of its laws.'" 32 N.Y.2d at 586-87, 347 N.Y.S.2d at 50, 300 N.E.2d at 423 (emphasis added).

As a second, and completely independent ground, Judge Fuld concluded that Schuminsky transacted business within the State based upon the totality of the transactions--that the court must consider not only the individual defendant's contact with the state, but also the effect his contact has on the party seeking to impose jurisdiction.

"And, beyond all this, a regard for reason and fair play almost demands that Hammond, who was obliged to answer and defend the complaint of a closely held corporation of which Schuminsky was president, should not be compelled to go to some other jurisdiction to enforce the latter's personal guarantee of his company's performance. Certainly, Schuminsky's 'contacts' with this State were such 'that the maintenance of the [third-party] suit does not offend 'traditional notions of fair play and substantial justice.'" 32 N.Y.2d at 587, 347 N.Y.S.2d at 50-51, 300 N.E.2d at 423.

This court has also recognized the importance of the foreign defendant's intent and the nature of its activities in determining whether long-arm jurisdiction is proper. In the case of Liquid Carriers Corporation v. American Marine Corporation, 375 F.2d 951 (2d Cir. 1967) this court emphasised that jurisdiction could be founded where an officer entered New York to further the corporation's business.

"It was not specified how many times defendant's officers came to New York or how long they remained there; it was considered to be enough to subject the corporation to New York jurisdiction that its officers entered New York State in order to further the business of their corporation.

"Under the circumstances it is clear that American Marine's vice president purposefully entered New York state in connection with his corporation's dealings with



Liquid Carriers and caused his corporation to be protected by New York law. The activities of American Marine's vice president within the state were sufficiently extensive and purposeful to constitute a transaction of business by American Marine under CPLR Section 302(a)1 and to subject American Marine to the jurisdiction of the New York courts." 375 F.2d at 955-56.

Accord, Sterling National Bank and Mortgage Co. v. Fidelity Mortgage Investors, 510 F.2d 870 (2d Cir. 1975).

These authorities dictate that Matchpoint has subjected itself to the long arm jurisdiction of New York. All of the contacts which were present in B & J Manufacturing are present in the instant case. Here, as in B & J Manufacturing we have a threat of infringement to the alleged infringer. Unlike B & J Manufacturing, we have many additional activities.

All of these additional activities not only relate to Rebound's cause of action, but also were in furtherance of Matchpoint's sole business--the patent. Thus, no doubt exists whether these activities were important to the furtherance of Matchpoint's business or were "purposeful".

Matchpoint had meetings in New York, wrote letters into New York and conducted telephone conversations into New York that left little doubt of its intentions to institute

an infringement action. (26a-27a; 30a; 50a-54a; 67a-71a)  
Not only were these threats directed against Rebound, but they were also addressed against Rebound's potential distributor Tensor. These threats were followed by a personal visit by Matchpoint's Vice President and Chairman of the Board, Kennington. He personally threatened enforcement of the patent. (68a-69a)  
He also attempted personally to negotiate the terms of a patent license with Rebound's Vice President. (68a-69a)

Matchpoint's Kennington then visited Rebound's potential distributor Tensor. (69a) Again, he threatened to enforce Matchpoint's patent, this time adding Tensor to the likely defendants. He mentioned the negotiations relating to a license agreement that he had with Rebound. (54a-55a) He made overtures to enlist Tensor as a distributor of Matchpoint's products in order to induce Tensor to abandon Rebound. (55a-56a; 105a-109a)

These visits were followed by additional letters and telephone calls between Matchpoint and Rebound in New York. (69a-70a) These exchanges were substantively similar to the prior discussions: threats of patent infringements and negotiations for a patent license. They even included the transmission of a proposed written patent license. (34a-38a)



In sum, Matchpoint exercised almost its complete scope of business powers in the State of New York: it threatened actions for patent infringement; it attempted to obtain a new distributor for its product; and at least professed to negotiate a patent license. The intent of these activities were clear--to remove Rebound or reduce its effectiveness as a competitor, and were in furtherance of Matchpoint's sole business--exploitation of its patent.

And as if the intent of these extensive activities were not enough, Matchpoint's activities have had their intended effect. Matchpoint fully accomplished one of its significant purposes--it dissuaded Tensor from becoming Rebound's distributor at a substantial loss in invested time and money. (50a) Moreover, it generally has delayed Rebound's penetration of the market through its (and Unique's) omnipresent threats of patent infringement suits. (61a-62a)

New York's long-arm statute would indeed be toothless if it would permit Matchpoint, a foreign corporation, over a period of approximately seven months to continuously assert threats of patent infringement, negotiate a patent license, negotiate a distributorship license, through telephone calls, by letters and personal visits, all of which were into New York, and which actually damaged Rebound's ability to compete, and not expose Matchpoint to the jurisdiction of New York courts.

Certainly, if a mere letter threat is sufficient to constitute transacting business, that in combination with the other factors, including personal presence in New York, there should be no issue that Matchpoint has "purposefully availed" itself of the privilege of "conducting business activities within the State". As the Eighth Circuit noted in B & J Manufacturing, Matchpoint's activities "were designed to reduce competition and thereby improve defendant's marketing and economic position." (483 F.2d at 598)

Rebound, a fledging domestic corporation, after suffering from Matchpoint's extensive and deliberate contacts with New York, in order to vindicate its rights, should not have to incur the additional burden of suing Matchpoint in a distant forum of Matchpoint's choosing.

Like Minnesota, New York does not leave its citizen remediless. The above quoted words of Judge Fuld, in Hi Fashion Wigs, supra, lend themselves to an appropos paraphrase:

"(A) regard for reason and fair play almost demands that [Rebound] . . . should not be compelled to go to some other jurisdiction to [vindicate its right to sell its products free from spurious threats of patent infringement]."



## POINT II

### REBOUND'S ALLEGATIONS AND SHOWING ARE SUFFICIENT TO SUBJECT MATCHPOINT TO JURISDICTION UNDER CPLR 302(a)(2) and (3)

For a second cause of action Rebound alleged that Matchpoint engaged in unfair competition. (10a-13a) Briefly, Rebound's claim is that, knowing full well that its patent was invalid, not enforceable and uninfringed, Matchpoint unlawfully attempted to capitalize on its patent through intimidation and misrepresentation. (6a) Pursuant to this program Matchpoint threatened patent infringement suits against Rebound, its potential distributor, and its customers. (13a) Furthermore, in an effort to disrupt Rebound's distribution of its product, Matchpoint engaged in negotiations with Rebound's potential distributor to induce it to distribute Matchpoint's products, rather than Rebound's. (12a) As previously detailed, these activities occurred in New York, both in person, by telephone calls, and by letters, and also elsewhere in the United States. (62a-64a; 52a-53a)

Based upon these allegations Rebound contended before the district court that Matchpoint committed a tort which subjected Matchpoint to personal jurisdiction in New York. The district court apparently did not reject Rebound's contention

that these allegations, if substantiated, stated a cognizable action for unfair competition<sup>7</sup> Rather, the court imposed a burden of proof upon Rebound more akin to that met in preliminary injunction motions. Judge Griesa apparently required Rebound to demonstrate that it had a likelihood of success.

"I hold that there has been no prima facie showing of a tortious act committed by Matchpoint in New York sufficient to serve as a basis for the assertion of personal jurisdiction over Matchpoint. I find no basis for holding that Kennington committed a tortious act in New York when he appeared here on January 30, 1975 and discussed possible licensing arrangements with Jacobson, possible distributorship, arrangements with Tensor and made the general statement that he intended to enforce whatever legal rights Matchpoint had." (126a-127a)

In reaching its conclusion the court recognized that Matchpoint committed all of the acts that Rebound alleged, but apparently held that Rebound had not proven that Matchpoint engaged in these acts with a tortious intent. However, as we show below, the law does not require on a

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<sup>7</sup> Indeed, it is well settled that these allegations do state an action for unfair competition. International Industries and Developments, Inc. v. Farbach Chemical Co., 241 F.2d 246 (6th Cir. 1957); Celebrity, Inc. v. Trina, Inc., 264 F.2d 956, 958-59 (1st Cir. 1959); Alamac Knitting Mills, Inc. v. Fairmoor Coat & Suit Corp., 31 Misc.2d 1023, 220 N.Y.S.2d 528 (Sup. Ct. 1961).



motion to determine jurisdiction that Rebound demonstrate Matchpoint's tortious intent--only that Matchpoint engaged in acts that would amount to a tort if the intent was present.

Moreover, in reaching its conclusion the district court only discussed CPLR 302(a)(2), and ignored 302(a)(3). We demonstrate below that Matchpoint engaged in tortious acts which would subject itself to jurisdiction under both these sections.

A. REBOUND NEED NOT SHOW MATCHPOINT'S  
INTENT TO ESTABLISH JURISDICTION UNDER  
CPLR 302(a)(2) OR (3).

New York law is clear: Where jurisdiction is bottomed on CPLR 302(a)(2) or (3), plaintiff does not have to establish prima facie that defendant had tortious intent. All that plaintiff need show is that defendant committed the acts alleged to be tortious. Rebound has more than met this burden.

Evans v. Planned Parenthood of Broome County, Inc., 43 A.D.2d 996, 352 N.Y.S.2d 257 (1974) sets forth the principle distinctly. Defendant contended that plaintiff had to prove prima facie that a tort was committed. The Appellate Division held otherwise, requiring that plaintiff simply demonstrate that defendant committed the act claimed to be tortious.

"Once the requirements of CPLR 302 (subd. [a] pars. 3 [i] or 3 [ii]) have been met, the only additional requirement is that the defendant was the author of acts without the State and that the plaintiff adequately frames a cause of action in tort arising from those acts. Since defendant does not deny that it is the manufacturer of the birth control pills taken by the plaintiff and plaintiff's complaint properly states causes of action in negligent manufacture and breach of warranty, the proof of negligence or breach of warranty and causation must await the plenary trial." 43 A.D.2d at 997, 352 N.Y.S.2d at 259-60 (emphasis added).

See, McLaughlin, Supplementary Practice Commentaries, McKinney's Consolidated Laws, CPLR 302, 1975-1976 Supp. at 16; 1 Weinstein-Korn-Miller, New York Civil Practice ¶302.12.

The district court cited Lehigh Valley Industries, Inc., supra, as requiring that plaintiff prove the merits of his claim. However, that case does not support Judge Griesa's legal proposition. Indeed, in that case this court specifically excluded from the jurisdictional question the issue whether the acts alleged constituted a tort, and if they did, whether the defendant had the requisite intent.

"In their Eighth Claim the appellants maintain that both David and Norman represented to Lehigh that Ornament's leather stripping business was unprofitable and



that it was in Ornament's best interests to abandon it; that Lehigh thereafter decided to discontinue the business and David and Norman later established their own enterprise in this field. This is alleged to constitute tortious activity, i.e., the wrongful appropriation of a business opportunity rightfully belonging to Ornament. The issue before us is not whether plaintiffs might succeed on the merits of this claim but whether or not the tort occurred in New York." 527 F.2d at 92 (emphasis added).

Judge Griesa also relied on his prior decision in Socialist Workers Party v. Attorney General, 375 F.Supp. 318 (S.D.N.Y.1974). Although apparently decided correctly on its facts (the record did "not provide any factual basis for connecting [the moving defendants] with any activities in New York" (375 F.Supp. at 322)), that case is clearly inapplicable here. Matchpoint has engaged in acts both in New York and outside New York that have had an effect in New York.

Rebound has alleged that Matchpoint intentionally, willfully and wantonly embarked upon a course to compete unfairly with plaintiff through unfounded charges of patent infringement, intimidation and misrepresentation. (6a, 10a-13a) The record leaves no doubt that Matchpoint in effect made charges of patent infringement against Rebound, its potential distributor Tensor, and other customers. (26a-27a; 30a; 50a-54a; 67a-71a) Similarly,

there is no controversy that Matchpoint conducted lengthy discussions with Tensor with the purpose of eliciting Tensor as a distributor of its product, rather than Rebound's. (55a-56a; 105a-109a) Nor is there any doubt that Rebound has been damaged. (52a-53a; 62a-64a)

Thus, Rebound has established that Matchpoint is the author of acts upon which its cause of action of unfair competition is founded. New York law dictates that whether those acts can be proved to have been malicious or made with knowledge of the patent's invalidity and non-infringement so as to establish Matchpoint's tortious liability must await plenary disposition.<sup>8</sup> That issue cannot be resolved summarily on a motion to dismiss for lack of personal jurisdiction.

Therefore, we submit that the district court erred in dismissing the complaint for lack of personal jurisdiction.

**B. MATCHPOINT IS SUBJECT TO PERSONAL  
JURISDICTION UNDER BOTH CPLR 302(a)(2)  
AND (3)**

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In determining its jurisdiction over Matchpoint, the

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<sup>8</sup> However, even at this early stage the record is not silent on Matchpoint's knowledge that its patent is invalid. Rebound's counsel sent detailed letters to Matchpoint proving the invalidity of the patent. (28a-29a; 31a-33a) Thus, we submit that dismissal pursuant to Fed.R.Civ.P. 12(b)6 or 56 would be improper--a material issue of fact has been raised that requires a trial.



district court apparently only considered CPLR 302(a)(2), which requires that the defendant commit a tortious act within the State. It ignored CPLR 302(a)(3) which includes an act without the State causing injury within the State if the defendant engages either in substantial interstate commerce or derives substantial revenue from goods used or consumed in this State.

The requirements of both of these sections are met. In particular, CPLR 302(a)(2) requires that defendant

"commits a tortious act within the State . . . ."

This requirement is certainly met by Matchpoint's chief executive officer David Kennington's visit to New York. (68a-69a; 54a-55a) During the visit he knowingly and deliberately threatened both Rebound and its potential distributor Tensor that Matchpoint would enforce its patent. Additionally, he attempted to induce Tensor away from Rebound to become a distributor of Matchpoint's product. (55a-56a; 105a-109a)

Moreover the telephone calls and letters between Texas and New York constitute "acts of tort within this State". That is, these threats were received in New York and their receipt constitutes the tort. E.g., Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 639 (2d Cir. 1956), cert denied, 352 U.S. 871 (1956)

("If the conduct complained of is fraudulent misrepresentation, the place of the wrong is not where the fraudulent statement was made, but where the plaintiff, as a result thereof, suffered a loss."); Honda Associates, Inc. v. Nozawa Trading Inc., 374 F.Supp. 886, 889 (S.D.N.Y. 1974) (catalogues received in New York advertising mismarked goods constitutes the tortious act of unfair competition within New York to subject foreign defendant to jurisdiction); Polish v. Threshold Technology Inc., 72 Misc. 2d 610, 340 N.Y.S. 2d 354 (Sup. Ct. 1972) (letter sent into State fraudulently requesting transmission out of State of later converted stock certificates constitutes a tortious act within New York).

Moreover, Matchpoint's activities certainly meet the requirements of CPLR 302(a)(3). This section permits jurisdiction where the defendant

"commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."



Matchpoint's patent infringement threats and insincere negotiations were committed throughout the country. (52a-53a, 62a-64a) Since Matchpoint's products are sold throughout this State, subsection (i) is satisfied. (63a) And in the alternative, subsection (ii) is satisfied since Matchpoint's threats were obviously intended to effect the ability of Rebound, a corporation within the state of New York, to compete and since Matchpoint derives substantial revenue from the sale of its product throughout the United States.<sup>9</sup> (112a)

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In sum, we have shown that within the established requirements of New York law Rebound has properly alleged that Matchpoint committed acts that amount to tortious conduct

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<sup>9</sup> Matchpoint may argue that it does not sell its product outside of Texas--that its sole customer is Unique located in Texas. However, when Matchpoint placed its goods in commerce and sold them to Unique, it did so with the knowledge and intent that they would be sold throughout the United States. Such a sale meets the requirements of CPLR 302(a)(3)(ii). As stated by the leading authority, "Subparagraph (ii) should prove especially useful in reaching [persons] who have no direct business contact with the state." Weinstein-Korn-Miller, New York Civil Practice, ¶302.14 at 3-126(1975).

and has sufficiently proved that Matchpoint was the author of those acts to withstand a motion for dismissal for lack of personal jurisdiction. Furthermore, we have shown that Matchpoint is subject to personal jurisdiction because of tortious conduct under CPLR 302(a)(2), CPLR 302(a)(3)(i), and CPLR 302(a)(3)(ii).

CONCLUSION

FOR THE REASONS GIVEN ABOVE THE ORDER  
DISMISSING THE COMPLAINT SHOULD BE REVERSED.

Respectfully submitted,

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James David Jacobs  
Of Counsel



## United States Court of Appeals for the Second Circuit

Rebound Systems

vs

Matco point industries

State of New York, County of New York, ss.:

Harold dudash, being duly sworn deposes and says that he is  
 agent for Weisman, Celle r Spett, Modlin Wertheimer & Schlesinger the attorney  
 for the above named plaintiff-appellant herein. That he is over  
 21 years of age, is not a party to the action and resides at 2346 Holland avneu, BX, NY

That on the 1st day of June, 1976, 19, he served the within an-endix and brief  
 of plaintiff-appellant

upon the attorneys for the parties and at the addresses as specified below

Jack A. Katz, attorney for the defendnt-appellee, 1423 Davis building, Dallas, Texas

75202

by depositing two copies of the brief and two copies of the appendix  
 to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-  
 tained by the United States Government at  
 90 Church Street, New York, New York  
 directed to the said attorneys for the parties as listed above at the addresses aforementioned  
 that being the addresses where  
 where they then kept offices between which places there was  
 munication by mail.

Sworn to before me, this 1st

day of June, 1976, 19

*Roland W. Johnson*  
 ROLAND W. JOHNSON,

Notary Public, State of New York

No. 4509705

Qualified in Delaware County  
 Commission Expires March 30, 1977

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